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NGOs
and the making of
EU migration policy

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Abstract

This paper analyses the role of NGOs in the decision-making process of EU legislation on asylum and migration. It shows that during the first phase NGOs struggled to benefit from the Europeanisation of migration policy. The Commission and European Parliament were the most receptive to their lobbying activities, but they had only little influence themselves. NGOs faced many problems to follow and influence the Council negotiations. As the institutional context of that time had made the Council extremely powerful, the final outcome of the NGO lobbying was close to zero. Their shift towards the outsider's tactic by using their moral authority didn't mobilise the public either. The Europeanisation of asylum and migration nevertheless provides NGOs with additional avenues to use their expert and logistical authority. The current institutional context has strengthened their possibilities, though the political climate and the revival of intergovernmental methods constraint their successfulness.

Keywords

NGOs, migration, asylum, EU legislation, negotiations, lobbying, influence, Europeanisation

1. Introduction

Since the so-called ‘refugee crisis’ in 2015, the migration policy of the European Union (EU), is at the centre of the public debate. The EU Council is openly divided on which direction it should develop, and many non-state actors seek to influence the Member States and Parliament with public statements. The wide media coverage of this battle could give the impression of an accessible and transparent decision-making process. But is this really the case and which role does civil society play in EU migration policymaking? Does the European harmonisation of migration policy offer more venues of influence for non-governmental organisations (NGOs), or does multilevel decision-making weaken their position? This chapter will address these questions while analysing the formation process of two EU directives on migration (one on family reunification and one on asylum procedures), which laid down the basis of the current EU migration policy. Unless referred to other sources, the information and conclusions in this chapter are based on my field- and desk research on these formation processes, conducted between 2006 and 2010.¹ Both directives have been negotiated during the first years of this millennium, after the Treaty of Amsterdam had laid down the legal basis for asylum and migration legislation in May 1999.² During that period, the Council was the only institute to adopt the directives, as the European Parliament only had a right to be consulted by the Council. On the Directive on the right to Family reunification, the Council negotiated from the beginning of 2000 to September 2003.³ After two years the Belgian Presidency concluded that the Council had reached a deadlock and asked the Commission to present a new proposal, including the compromises that had been achieved and solutions for the controversies.⁴ The new proposal, which left more room for manoeuvre for the Member States, was accepted as a sound basis by the Member States.⁵ They nevertheless needed more than a year to adopt the Directive.⁶

The process to the adoption of the Asylum Procedures Directive had a similar pattern. More than a year after presentation of the first proposal in October 2000, the Belgian Presidency submitted a request to the Commission to draft a new proposal, accompanied by a number of principles that the proposal

1 T. Strik, *Besluitvorming over asiel- en migratierichtlijnen. De samenwerking tussen nationaal en Europees niveau* (Nijmegen 2011). More information on the study under ‘Assessing the negotiation process: methodology’.

2 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Final Act, Official Journal C 340 , 10/11/1997 P. 0115.

3 See the first proposal of the Commission, COM(1999)638, 1 December 1999 and the second, COM(2000)624, 10 October 2000, released after the European Parliament had adopted its resolution.

4 Presidency Conclusions - Laeken, 14 and 15 December 2001, SN 300/1/01.

5 COM(2002)225, 2 May 2002.

6 The Directive on the right to Family Reunification, 2003/86, OJ 3 October 2003, L 251/12.

should adhere to.⁷ After the Commission had presented its proposal mid 2002, the Council reached a political agreement on 30 April, the day before accession of ten new EU Member States.⁸ As it unsuccessfully tried to reach a common list of safe countries of origin, it took until December 2005 before the Council decided to adopt the directive, which included a procedure for adopting a common list in the future.⁹

During the formation of these first directives on migration of third country nationals, NGOs struggled to find the most effective strategy to benefit from the Europeanisation of migration policy. Their lobby activities resulted in some influence prior to and after the Council negotiations, but hardly during the actual decisions taken by the Council. As the institutional context of that time had made the Council extremely powerful, the final outcome of the NGO lobbying was close to zero. In order to understand this limited result, I will elaborate on the objectives of the NGOs, the strategies they used to achieve their aims and the factors determining their influence. While doing so, I will distinguish between the different stages of their activities in relation to the decision-making process as well as the different functions that NGOs are ascribed to. In that context I will assess if they had and used one or more kinds of authority Schrover, Vosters & Glynn refer to in this issue: expert, moral or logistical authority.¹⁰

2. Assessing the negotiation process: methodology

Since the beginning of this century, the European Union has been working towards common rules on legal migration for third country nationals and a European Common Asylum System. Now, less than two decades later, this process has resulted in an impressive number of first generation directives and a number of additional or recast-directives. Although the decision-making process took place exclusively within the institutions of the EU, many actors surrounding these institutions tried to influence the outcome of this process.

The academic debate on the role of NGOs in migration legislative procedures is inconclusive. Any common conclusion on the role and influence of NGOs however, should start with a common definition of influence. Yet EU interest group literature seems to avoid the definition and assessment of influence rather

7 See the first proposal, COM(2000)278, 24 October 2000 and Presidency Conclusion no. 41, Laeken, SN 300/1/01 REV 1.

8 See the revised proposal COM(2002)326, 18 June 2002; see the agreement 8771/04 ASILE 33, 30 April 2004.

9 Procedures Directive, 2005/85, OJ 13 December 2005, L 326/13.

10 M. Schrover et. al., 'NGOs and West European Migration Management (1860s until present)', *Journal of Migration History* 2019.

than address it.¹¹ Influence can be defined along end results, meaning that the interest of a lobby group should be reflected in policy outcomes. Michalowitz pointed out that if the aimed results are achieved, it cannot necessarily be linked to the lobbying activities, even if the outcomes reflect a shift in the initial positions of decision-makers. They could be caused by other factors playing a role during the negotiations like changes of government or other political developments.¹² The more precise the outcome, such as specific wordings or provisions advocated for by NGOs, the more likely that they are derived from their lobbying activities. It seems, however, more secure to draw conclusions about the absence of influence. If the proposed wordings or provisions are not incorporated in the directives, NGOs have apparently been unsuccessful in that regard. It can however not be excluded that they were successful in other ways at the same time, such as having raised public awareness or strengthened opposition in parliaments or other actors involved, as influence has many faces. It is hence indeed important to study the activities and the possible results of all domains at the same time rather than studying them in isolation.

In order to determine the influence of different factors and actors on the making of EU migration law, I have assessed the negotiations of the two key directives that were the first to be adopted: the Asylum Procedures Directive of 2005, and the Family Reunification Directive of 2003. Qualitative and empirical research is ideally suited for analysing the decision-making process within the Council, as factors such as political preferences, attitudes, norms and background are hard to measure in quantitative research.¹³ I analysed the Commission proposals and Council documents reflecting the positions Member States took during the negotiations, but also the amendments of the European Parliament as well as the position papers and press releases of NGOs that tried to influence the decision-making process. A structural comparison of the documents led to insights into how the debate in the Council developed, but also where and how text proposals of NGOs and the United Nations High Commissioner for Refugees (UNHCR) were adopted and how these organisations changed their attitude in the course of the process. In addition, I conducted 34 interviews with persons more or less closely involved in the decision-making process, in order to gain contextual background information and understand the dynamics between the different actors. The interviews were semi-structured and included questions on these actors' positions and objectives, but also their perception of which factors and actors influenced the negotiations and the final results. Part of the respondents

11 I. Michalowitz, 'Wat determines influence? Assessing conditions for decision-making influence of interest groups in the EU', *Journal of European Public Policy*, 14:1 January 2007 132-151, 133.

12 Michalowitz, 'Wat determines influence?', 134.

13 D. Heisenberg, 'How should we best study the Council of Ministers?', in: D. Naurin and H. Wallace, *Unveiling the Council of the European Union, Games Governments Play in Brussels*, (London 2008) 261-276.

worked at the EU level for the Commission, Council, Parliament, NGOs and UNHCR. The other part of the empirical research was conducted at the national level. Besides focusing on the objective and behaviour of the actors at EU level, I paid special attention to the positions taken at the national level in the Netherlands and Germany, during both the decision-making and transposition of the directives. I therefore also conducted interviews with officials, politicians and NGOs in Germany and the Netherlands.

UNHCR takes a special position among the lobbyists. It is an IGO (intergovernmental organisation), which works on the basis of its mandate granted by the Refugee Convention to promote and monitor state parties' compliance with their treaty obligations. In a declaration to the Treaty of Amsterdam, which came into force in 1999, the EU committed to involve UNHCR in its decisions on asylum matters.¹⁴

3. The negotiation table as a market place

During the legislative period based on the Treaty of Amsterdam, the decision-making process on Justice and Home Affairs (JHA) matters centred around the Commission and Council, based on their competences granted by title IV of the EC-treaty.¹⁵ The Commission took the initiative for the draft directives and acted as advisor and mediator during the negotiations at the Council.¹⁶ The principle of unanimity in the Council on Justice and Home Affairs -matters and the limited role of the European Parliament (consultation), paved the way for a dominant role for national interests. As every single Member State needed to give its consent, it had the power to insist on certain amendments, which often contradicted the interests of the Commission.¹⁷ This intergovernmental approach impeded the institutionalisation of an EU migrant inclusion policy.¹⁸ Whereas the Commission mainly defended the aim of harmonisation at a high protection level for migrants,

14 Declaration no. 17 on Article 73k of the Treaty establishing the European Community, Final Act, 29 March 1996, Turin.

15 The legal basis for the Procedures Directive was Article 63 (1) (d) and the basis for the Family Reunification Directive was Article 63 (3) (a) EC-Treaty.

16 Most of the negotiations took place in the Working Group consisting of governmental experts. The next higher level was Scifa, consisting of the managers of the department involved, and the highest level of officials was COREPER, where the heads of the Permanent Representatives (PR) had to reach an agreement before it could be referred to the Council of Ministers. The Council could refer the text back to the JHA-Council, where experts of the PR solved the outstanding questions and problems of a more technical nature. These were the most informal meetings, without translators. See Strik, *Asiel- en migratierichtlijnen*, 45-49.

17 Strik, *Asiel- en migratierichtlijnen*, 391-393.

18 See also A. Geddes, 'Lobbying for migrant inclusion in the European Union: new opportunities for transnational advocacy?', *Journal of European Public Policy* 7:4 (2000), 632-649, 634.

the ministers of Interior or Justice in the Council primarily aimed for maintaining their national legislation and preferably also their national sovereignty. Harmonisation as such was not recognised as being in their national interest, despite official declarations that claimed the opposite.¹⁹ These national aims implied that the delegations negotiated according to the non-intervention principle: taking a neutral position regarding more restrictive proposals of other Member States or even welcoming them as an extra option for their own policy. The negotiation table hence transformed into a 'market of optional provisions' for which delegations' actions were mutually supportive. This exchange of amendments only functioned well regarding proposals which lowered the level of protection, as they did not imply extra obligations.

As the Council had the final say, it drastically changed the proposals of the Commission by lowering the standards and creating more discretion for the Member States. The amendments of the European Parliament, which merely supported the Commission, were practically ignored. This made the Parliament use its competence to bring both directives to the Court of Justice, requesting it to annul certain provisions of the directives.²⁰

During the negotiation process, the NGOs exerted most influence during the preparation stage carried out by the Commission and the consultation stage involving the European Parliament. In its proposals the Commission referred to its formal consultation channel, which aimed to strengthen the legitimacy of the draft directives. Their de facto influence can be derived from certain provisions in the proposals of the Commission and opinions of the Parliament which were identical to the proposals of the NGOs and UNHCR. The texts that the NGOs and UNHCR had successfully promoted towards the Commission and Parliament were however deleted or weakened by the Council, or transferred to the preamble of the directives. After adoption of both directives, the NGOs successfully advocated for an action for annulment by the European Parliament before the Court of Justice. Their lobbying activities hence resulted in some influence prior to and after the Council negotiations, but hardly during the actual decisions taken by the Council. As the institutional context of that time had made the Council extremely powerful, the final outcome of the NGO lobbying was close to zero.²¹

19 See for instance the Tampere conclusions of 1999, where the European Council expressed the objective of harmonisation of asylum and migration policy, Council document no. 200/1/99.

20 See the judgments CJEU 27 June 2006, C-540/03, *Parliament against Council* and CJEU 6 May 2008, C-133/06, *Parliament against Council*.

21 Strik, *Asiel- en migratierichtlijnen*, 402-405.

4. NGOs: their objectives

Many of the most influential and active pro-migrant lobby groups are human rights organisations (Amnesty International, European Council on Refugees and Exiles - ECRE-) or church-based organisations (Caritas, Churches Commission for Migrants in Europe - CCME-). Where Schrover, Vosters & Glynn distinguish between three kinds of authority (expert, moral and logistical authority), the groups mentioned here derive their influence from their moral and expert authority.²² They underline and promote the importance of a rights-based dimension of European integration.²³ Their objectives depend on their divergent mandates. Amnesty's only aim was that the directive would be compliant with international human rights obligations. Whereas Amnesty avoided using policy considerations, ECRE took a position in favour of harmonisation at the highest protection level. Its national members determined the framework of reference: while Southern Member States were less represented, the position papers of ECRE were largely influenced by the northern NGOs. This phenomenon, which similarly emerged in the Council, is related to the longer history of immigration (policy) in north of Europe. As UNHCR had a formal monitoring competence regarding the Member States, its position was stronger than those of NGOs.²⁴ It had for instance occasionally the opportunity to attend or even address the Council meetings.

The CCME wrote its comments together with other Christian organisations.²⁵ As so many more NGOs focused on asylum issues, CCME was particularly active on the Family Reunification Directive. Aiming to encourage a strong right to family reunification, it took two priorities: ensuring that migrants can choose when they reunite (opposing waiting periods or age-limits) and that the directive would apply to both refugees and beneficiaries of subsidiary protection.

The Meijers Committee, an independent think-tank of academics on European migration and criminal law, lobbied at the negotiations on both directives from a human rights perspective. It also contributed to the work of the Immigration Law Practitioners' Association (ILPA) and Migration Policy Group (MPG) which advocated for safeguarding a fair asylum policy, equal treatment between third country nationals and EU citizens regarding family reunification and rights after admission, such as access to the labour market. In accordance with those principles, they presented draft texts called the 'Amsterdam Proposals' already before the Commission started drafting its proposals based on the Treaty of Amsterdam. These documents clearly demonstrated their expert

22 Schrover et. al., 'NGO's', 2019.

23 Geddes, 'Lobbying for migrant inclusion', 638.

24 See the preamble and Article 35 of the Refugee Convention, Article II Protocol and Article 9 UNHCR Statute.

25 Its partners were Caritas Europa, COMECE (Commission of the Bishops' Conferences of the European Community), ICMC (International Catholic Migration Commission), JRS (Jesuit Refugee Service Europe) and QCEA (Quaker Council for European Affairs).

authority. Their timing, in particular, created optimal chances for influence, as the Commission did not have much reference material at its disposal at that stage.

Most of the pro-migrant NGOs involved in lobbying had national and EU representatives. ECRE served as a European umbrella organization for the national refugee organisations, whereas Amnesty International located in Brussels communicated intensively with its departments in the Member States. They both faced the common problem of ‘umbrella’ organisations representing the interests of sub-national and national organisations, as identified by Streeck, in that reliance on horizontal coordination can be a ‘weak substitute for consolidated formal organisation at [the] national level’.²⁶ This is particularly the case if a horizontal coordination needs to include divergent national policy styles and perspectives which are not necessarily compatible.²⁷

But the multi-level presence also had a significant added value for both levels, as it contributed to their knowledge and thus to their expert authority. National NGOs were better informed on the decision-making process and used the legal analyses of the Commission proposals made at the EU level. The EU offices learned about the particularities of the national policies, which enabled them to anticipate certain government positions in the Council, such as explaining their agenda for such interventions and warning their fellow negotiators of their implications. The German department of Amnesty for instance made its EU office aware of the potential effects of the German proposal to include the option of the ‘super-safe’ third country concept. The adoption of this concept at the EU level would mean that dubious neighbours of the new Member States, such as Ukraine, Serbia and Russia, attained the status of a safe third country. The respondent recalled:

For a while we did not realise how badly the negotiations developed. But suddenly we saw the provision on supersafe third countries, through which people can be returned at the border straight away. We said to Brussels: we have to give up supporting this process. The day after UNHCR took the same position. We were just a little earlier while we had this experience in Germany with the *Drittstaatregelung*, and therefore knew that the directive could not be recovered.²⁸

After the German department of Amnesty had called upon the Member States not to adopt the directive, the European NGOs urged the Commission to withdraw its proposal. This example of strengthening the lobby by coordinating and

26 W. Streeck, ‘Neo-voluntarism: a new European social policy regime?’ in: G. Marks *et al.* (eds), *Governance in the European Union* (London 1996), p. 64-94, 85.

27 Geddes, ‘Lobbying for migrant inclusion’, 639.

28 Strik, *Asiel- en migratierichtlijnen*, 245-249.

mobilising divisions at different levels (or sometimes in different countries), shows that the NGOs also benefitted from their logistical authority as well.

5. Multilevel lobbying: the EU level

Apart from the formal channels like the consultation stage, most NGOs had an informal work relationship with the Commission. According to a respondent from Amnesty, the officials of the new DG JLS tasked with drafting the legislation on migration lacked sufficient expertise on human rights and international refugee law. By supporting them with legal arguments for the proposals, Amnesty managed to enhance its influence.

The NGOs were actually positively surprised about the proposal for the Family Reunification Directive. CCME even praised the proposal for the right to family reunification and the more favourable rules for refugees.²⁹ NGOs however did not claim any success, and explained that the high level of protection proposed by the Commission was the result of the fact that the author of the Commission proposal had previously worked for an NGO advocating for migrant rights. A respondent of the Meijers Committee admitted that the organisation deliberately moderated its enthusiasm, as to avoid the Member States becoming suspicious. But the proposal anyway led to a furious response from Germany, who accused the Commission of only having taken into account the positions of NGOs and academics and not the national interests.

When the Commission released its proposal for the Procedures Directive, most NGOs responded slightly more critically. ECRE rejected the safe third country concepts, which were included under pressure of the Member States. It opposed the room for national discretion regarding detention, suspensive effect during appeal and advocated for stricter criteria. A respondent of ECRE was nevertheless positive on the influence of his organisation:

On other issues we had been successful, such as the right to a personal interview, the right to legal aid, safeguards for female asylum seekers. It was important that the Commission proposal included these procedural safeguards, as it would have been much more difficult to have them inserted after the release of the document.³⁰

UNHCR considered the Commission proposal to be balanced but criticised the proposed harmonisation of accelerated and admissibility procedures. It called

29 *Position on EU Commission Proposal for a Council Directive on the right to family reunification*, COM (1999) 638 def., Caritas Europa, CCME, COMECE, ICMC, Brussel, 20 March 2000, www.ccme.be.

30 Strik, *Asiel- en migratierichtlijnen*, 239-244.

upon stricter criteria regarding safe third country concepts and manifestly unfounded claims. A respondent of the Commission expressed his disappointment about these negative responses. According to him, the organisations did not have a clear picture of the national legislations, as the Commission proposal offered more protection than the national standards. If the proposal would have been adopted by the Council, the Member States would have to improve their standards. The respondent observed that by rejecting the Commission proposal, the NGOs had contributed to being side-lined by the Council during the negotiation process. The Council only took notice of the written comments they sent in for each Council meeting.

Comparing both draft directives, it becomes clear that the NGOs and the Commission were merely on the same side, but that the Commission was forced to take the Member States' interests into account in order to preserve the content of its proposals.³¹ That this strategy implied alienation of the principles of the NGOs became evident during the revision of its proposals, which was meant to overcome the deadlock in the negotiations between Member States. In order to create any progress, the European Council had requested the Commission for a revised proposal, taking into account compromises already agreed upon by the Member States.³²

6. Going public

During that revision process, the Commission worked closely with the Member States and left hardly any room for involvement for the NGOs. Its primary aim was to create sufficient support from the Member States with a view to reaching a common agreement. The result was not surprising: where the first Commission proposals were characterised by their compatibility with the positions of the NGOs, the revised proposals merely reflected the wishes of the Member States. The revised versions indeed had more support from the Member States, but they led to much criticism from the NGOs and UNHCR.

The distance felt by the NGOs towards the content but also the EU institutions forced them to reconsider their strategy. The respondent of CCME explained:

The first two years I had the impression of an open debate, but that changed in the period from 2001 until 2003. Access to the negotiations became more

31 Strik, *Asiel- en migratierichtlijnen*, 402-405.

32 Presidency Conclusions - Laeken, 14-15 December 2001, SN 300/1/01 REV 1.

difficult. This influenced our strategy: in the beginning we had more informal discussions, but later on we merely expressed our positions in public.³³

Regarding the Family Reunification Directive, ECRE expressed its deep concerns in a statement and CCME addressed the then Commissioner for Home Affairs Vitorino directly with a public appeal for the Commission to withdraw its revised proposal for the directive. On the eve of the Greek presidency Archbishop Christodoulos called upon the JHA ministers publicly not to hinder but to facilitate family reunification. He emphasised that long waiting periods harmed the children involved, as they would suffer longer periods of separation from one of their parents. Just before the JHA-Council was about to conclude a political agreement, the Meijers Committee wrote a public letter to Commissioner Vitorino also requesting him to withdraw the draft directive. After it became clear that they had not convinced the Commission and that the political agreement was concluded in the Council, the churches collectively expressed their disappointment about the decreased ambition level. They referred to the limited definition of a family, the age-limit and the waiting periods, and called upon the Council to keep the standstill clause in the directive (which would have refrained Member States from lowering their national standards to the minimum level of the directive) and the provision that Member States may adopt or maintain more favourable rules.³⁴ At the same time, CCME put pressure on the European Parliament to start an annulment procedure. The Meijers Committee supported the Parliament in formulating this request for annulment to the Court of Justice. This request, which asked for the annulment of three optional clauses that according to the Parliament violated Article 8 of the European Convention of Human Rights, was rejected by the Court. In its judgment, however, the Court emphasised that the directive had created a strong right to family reunification for third country nationals and had significantly restricted the sovereignty of the Member States. This was the first of a range of judgements that would force Member States to adapt their rules in favour of migrant families.³⁵ The annulment procedure hence offered the Court the opportunity to give guidance to the Member States at a very early stage of the implementation process and to stimulate lawyers and national judges to take the right to family reunification seriously. As the Parliament had only recently gained the competence to initiate an annulment procedure in JHA-matters, the expertise and support by the Meijers Committee was very welcome and perhaps even decisive for the actual decision to proceed.

The criticism against the revised draft for the Procedures directive only emerged after the Council had restarted its negotiations. ECRE and Amnesty sent

33 Strik, *Asiel- en migratierichtlijnen*, 63-70.

34 *Position on the Amended EU Commission Proposal for a Council Directive on the right to family reunification*, COM (2002) 225 final, Caritas Europa, CCME, COMECE, ICMC, JRS Europe, QCEA, Brussels, 17 December 2002.

35 CJEU 27 June 2006, C-540/03, *Parliament against Council*.

a common letter to SCIFA (the management level of the national officials), and expressed their concerns about the negotiation results. Later on, ECRE accused the Member States of risking *refoulement*, and called upon the Member States to repair the serious protection flaws.³⁶ The UN High Commissioner for the Refugees personally intervened during a JHA Council meeting, criticising the safe third country concepts and the derogations to the principle of suspensive effect. UNHCR expressed its fear that the Member States were negotiating towards the lowest common denominator, which could lead to a violation of the most crucial protection standards.³⁷ In a public statement, ECRE supported the position of UNHCR.³⁸ One month before the Irish Presidency presented a political agreement, ten European NGOs collectively called upon Commissioner Vitorino to withdraw its proposal, pointing out the gap between the content and international standards.³⁹ UNHCR also warned that the agreement could lead to violations of international refugee law. After adoption of the directive, it called upon the Member States not to adapt their legislation to the minimum level of the directive, but instead to strive for sufficient safeguards and a high protection level for refugees. Its specific position, related to the advisory role towards national governments, however restricted the room for manoeuvre for UNHCR regarding responses and formulations in public. It found a *modus operandi* in cooperation with the NGOs, where each of them had an added value. In addition to the common public appeal to the Council by the ten NGOs, UNHCR did the same in its own appeal. According to the respondent of UNHCR, this was the outcome of a common strategy, whereby the organisations would maximize their influence:

NGOs were not less effective than we were: they were more flexible and could sometimes say things that UNHCR could not. But we cooperated very well, on our positions but also on the timing of press releases and strategy.⁴⁰

So, the cooperation between the NGOs and the IGO was mutually beneficial, as they had the same objectives and both had limited opportunities. The overview of their actions over time shows that the NGOs, think tanks and UNHCR developed a similar strategy, led by a common increasing disappointment during

36 ECRE, Refugee-NGOs in more than 30 European Countries reject Draft Directive on Asylum procedures, London September 2003, www.ecre.org.

37 See also the Aide Memoire of UNHCR of 18 November 2003, <http://www.refworld.org/docid/402a2d6e4.html>.

38 'Appalling flaws in Directive on Asylum Procedures still not addressed', Press release of 25 November 2003, www.ecre.org.

39 Call for withdrawal of the Asylum Procedures Directive, ECRE, Amnesty, Human Rights Watch, Caritas Europa, CCME, Ilga, Medecins sans Frontières, Pax Christi International, Save the Children, QSEA, 22 March 2004, <http://www.statewatch.org/news/2004/mar/ngo-asylum-letter.pdf>

40 Strik, *Asiel- en migratierichtlijnen*, 239-244.

the negotiations. They regarded the first Commission proposal positively or slightly critically with a constructive tone, the second proposal very critically and at the end of the negotiations they sent out alarming messages trying to reach a larger audience.

There were eventually three reasons for the shift to a more public advocacy campaign. First, the Commission no longer functioned as their ally, as it was in need of the support of the Member States, who merely rejected the pleas of the NGOs. Second, they had only limited access to the Council, where the formation process actually took place. Third, the NGOs were increasingly dissatisfied with the way the draft texts were transforming; they included more national discretion and less individual safeguards and rights. As the growing need to influence the draft texts took place at the same time that their possibilities to influence the process decreased, they decided to seek the support of civil society and go public. They tried to use their moral authority in order to mobilise the people, citizens who have the power to punish or reward their governments at the next elections. A clear example which occurred a few years later involved a public call to the Justice and Home Affairs Council for a fair and consistent EU Migration and Asylum Policy.⁴¹ In this statement, the organisation stressed that it represented different churches throughout Europe - Anglican, Orthodox, Protestant and Roman Catholic - and Christian organisations particularly concerned with migrants and refugees and declared:

As Christian organisations, we are deeply committed to the dignity of the human individual created in the image of God, the concept of global solidarity and the idea of a society welcoming strangers.

With the expression of these underlying principles, on which basis they called for the prohibition of criminalising irregular stay, the promotion of family life and a dignified return policy, they ensured maximum benefit from their moral authority. Politicians are obviously aware that members of a church may be sensitive to such declarations.

Their aspiration to put pressure on governments by influencing public opinion, however, was also frustrated as the media remained silent after the NGOs released their alarming public messages. The absence of public indignation exposed the weakness of the NGOs and even may have facilitated restrictive adaptations. NGOs did not succeed in compensating for their lack of power, as the lack of public support for their statements confirmed for the Member States that there was no need to take them more seriously. Maybe the

41 *Towards a balanced approach in EU migration and Asylum Policy: 12 recommendations*, COMECO press release, 21 October 2004, <http://www.comece.eu/site/en/ourwork/pressreleases/2004/article/7571.html>

'vote factor' was not as significant as in other policy areas, since the migrants represented by the NGOs failed to threaten electoral change.

This move from insider to outsider tactics, as explained in the introductory chapter of this Special Issue was not the result of a long-term strategy adopted from the beginning, but it occurred more or less spontaneously for two reasons.⁴² First, the more progress was made in the decision-making process, the more exclusion was experienced by the NGOs. The Commission became less admissible in order to protect the negotiation results, and the lack of access to the Council documents impeded a timely monitoring of the dynamics and detailed changes. The policy of the Council on accessibility was based on the idea that access might harm the interest of coming to common agreement.⁴³ In response to my request for a Council document which included a discussion paper on safe third country concepts, I received a rejection with the following standard reasoning:

Release to the public of this information would be likely to put the Presidency and delegations under additional pressure from stakeholders making it more difficult to reach a compromise. Full disclosure of the document would therefore be premature in that it could impede the proper conduct of discussions in the Council's preparatory bodies. It would affect the negotiating processes and diminish the chances of the Council reaching an agreement. Full disclosure of the document at this stage would therefore seriously undermine the decision-making-process of the Council.

So the Council policy was (and still is) a clear strategy to protect Member States against influence from lobbyists, although the EU General Court already in 2011 demanded the disclosure of Council Documents regarding legislative procedures, as 'the public right of access to documents is connected to the democratic nature of institutions'.⁴⁴ Due to this strategy NGOs remained outsiders during the Council negotiations against their will. But their frustration about the limited effects of their insider tactic and the loss of the insider position which they enjoyed at the Commission and the European Parliament led to the decision to use this outsider position by seeking public support for their ideas. In their perception, the NGOs had nothing to lose, which is why the public campaign could not lead to a loss of influence for the negotiations either. As the special position of UNHCR only led to a few successful interventions, such as a reference to international obligations in the safe third country provisions, the shift from insider to outsider was also visible

42 See Schrover et al, 'NGOs', 2019.

43 The Council frequently refuses access to documents on the basis of Article 4(3) of Regulation (EC) No 1049/2001 by relying on the "sensitivity" of such documents.

44 General Court 22 March 2011, T-233/09, *Access info Europe vs Council of the European Union*, para. 55.

for UNHCR, although non-accessibility was less obvious compared to the NGOs. Both the process behind their exclusion and the process towards lowering the standards to below what they perceived as acceptable actually unified NGOs and UNHCR in their public rejection. Even after adoption, UNHCR publicly stated that the Directive “may lead to breaches of international refugee law.”⁴⁵

7. Different tactics to break the bastion

Influencing the Commission and Parliament was obviously rather easy for the NGOs and UNHCR because of the views they shared on the desirable standards on asylum and migration. Lobbying at the Council and the national delegations was a much bigger challenge. In the institutional context of the first stage of EU asylum and migration law, the Council was extremely powerful. By curtailing the influence of the Commission and Parliament, the Council downplayed the role of the NGOs and UNHCR as well. NGOs thus needed to have an effective strategy to ensure that their impact would remain for the adoption process by the Council. I identified five main reasons for the low level of their impact on the work of the Council.

First, the lobbyists from NGOs had less personal contacts with negotiators within the Council than with officials from the Commission and officials and Members of Parliament, although the Council had exclusive competence to adopt the directives. A respondent of the Permanent Representative of one Member State said:

During my eight years of working experience in Brussels, NGOs contacted us only occasionally. There was this circuit of emails, but they did not come to us saying something like: “About the proposal you discussed: do you know that we made another proposal on that issue...?” No, they didn’t do that and I regretted that very much.⁴⁶

Especially in view of the power of the Council, NGOs’ inefficient network proved to be a major weakness. They had no formal access to this venue, but could have invested more in personal contacts with national officials representing Member States, working at the ministry in their capital cities or at the Permanent

45 UNHCR Press Release, UNHCR regrets missed opportunity to adopt high EU asylum standards, 30 April 2004, <http://www.unhcr.org/news/press/2004/4/40921f4e4/unhcr-regrets-missed-opportunity-adopt-high-eu-asylum-standards.html>.

46 Strik, *Asiel- en migratierichtlijnen*, 402-405.

Representatives in Brussels. The European and national divisions of the NGOs could have been complementary in that regard. The absence of personal contacts limited the chance to exchange information, but also to gain vital inside information about negotiation positions or dilemmas which could have been addressed by the NGOs.

Second, the timing made it difficult to have an impact on the negotiations, as the lobby was limited to written comments on compromises that the Council (or the working group, Scifa or Coreper) had already agreed. Reviewing these laboriously accomplished compromises was out of the question for the Council, which made the comments of the NGOs useless for national delegations. Some NGO respondents explained this by pointing to the lack of transparency, in particular the lack of access to the Council documents, which prevented them from making adequate and timely interventions. Some other NGO officials however said they were perfectly capable of following the negotiations because of the documents they received informally, which emphasises the importance of personal contacts with national delegations.

A third factor that limited their influence on the Council negotiations was that NGOs and national delegations did not have a common approach: NGOs based their positions on human rights, whereas the delegations served their national interests by maintaining national legislation and discretion. Promoting a higher protection level or harmonisation was not part of their real agenda. The NGO perspective had a clear common ground with the communitarian perspective of the Commission and Parliament, but not with the national perspective of the Council.

These divergent national interests led, as a fourth explanation, to many tensions at the negotiation table. It made the Council act in a cocooned environment which made them even less sensitive to external influences.

The fifth factor relates to the lack of a common language: where the delegations searched for solutions to concrete (procedural or operational) questions and dilemmas, the lobbyists held on to their positions that were based on general principles and objectives. As their position papers were not useful for finding the necessary detailed, precise and pragmatic proposals necessary for the Council: they enabled the negotiators to ignore them, or at least leave them to one side. Here the combination of timing and content created a misfit between the actors. Although the decision not to contribute to practical solutions is perfectly legitimate for NGOs, their lobby was perceived as having a permissive stance regarding the European Council decision-making process.

By way of exception, I met with one NGO official who drafted text proposals for national delegations, especially those from smaller countries with less experience in migration law. She gained influence by offering her expertise on refugee law and human rights law. This led to an exchange of information in both interests. It was the result of a confidential relationship, which she primarily built up with officials from the Permanent Representation, as they both lived their

daily lives in Brussels and frequently met on occasions like receptions and seminars. The advantage of this 'behind the scenes' tactic was that they had influence, the disadvantage was that they could not take credit for it. This exception may very well illustrate the dilemmas of NGOs: as long as they only focused on their principles, they could hardly influence the negotiations.

UNHCR also took another approach. Due to the formal role as a monitoring body of the UN, Member States had more obligations to respond to the UNHCR position than it had towards the NGOs. That may have been one of the reasons that UNHCR was more focused on cooperating with the Member States. The respondent of UNHCR pointed out the differences in that regard:

Some NGOs are uncompromising and don't want to become involved in certain debates. But we think that we are more effective by entering into the discussions with the Member States. It was perfectly clear that Member States would not leave out the third safe country concepts. In that case you'd better advocate for good safeguards than arguing against the whole concept. In general we strive for the least harmful way that undesirable concepts are applied.⁴⁷

According to a respondent from the Commission, the UNHCR criticism on the safe third country concept led to draft sessions in the Council. In his view, the officials were successful in satisfying UNHCR:

For us as the Commission the view of UNHCR was decisive for our judgment on the negotiation result. If UNHCR would be able to accept certain formulations, Vitorino would be able to respond positively at the press conference about the political agreement. This proved to be successful in the end.⁴⁸

Though these concessions did not prevent UNHCR from disapproving the political agreement, the Commission justified its own approval to the directive by referring to the involvement of UNHCR during the negotiations. This shows that the formal position of UNHCR may have led to more direct influence but also to contribute to the legitimacy of an instrument rejected by the organisation, at least partially.

8. Multilevel lobbying: the national level

As Member States were able to veto any Council decision on the directives, the position of each government was decisive. National NGOs however did not seem

47 Strik, *Asiel- en migratierichtlijnen*, 239-244.

48 Strik, *Asiel- en migratierichtlijnen*, 239-244.

to be fully aware of the opportunities it created for them in having a direct impact on the directive. This might be related to their underestimation of the consequences of the directive, which they had in common with parliamentarians, and to a large extent with officials as well. A respondent of the Dutch Refugee Council explained:

As a national NGO we did not have the idea that we were able to influence the negotiations in Brussels. We felt quite powerless and hoped that ECRE could achieve more at the EU level. And in fact, we also believed that the directive would have more impact in other Member States.⁴⁹

As far as the national NGOs advocated for changes in the draft directive or the position of the Netherlands, they focussed on specific national elements. The priority of the Dutch Refugee Council was to abolish certain restrictions in the Dutch policy, such as the additional requirements for family ties and the time-limit of three months in which refugees had to apply for family reunification.⁵⁰ It called the Dutch negotiation position into question, pointing out the exceptional character of the Dutch policies compared to other Member States. A respondent of the Dutch Refugee Council explained:

We tried to show the Dutch parliament how isolated the Dutch government was regarding certain policy issues. Our hope was that the Netherlands would fail in Brussels, and that the directive would force the Dutch government to adapt its policy. At that moment we did not expect at all that a national 'worst practice' would become the European norm. This possibility really did not come to our mind.⁵¹

The NGO hence seized the opportunity to lobby for a 'normalisation' of the Dutch policy through the directive. The advocacy was still nationally oriented, possibly due to a lack of awareness of the risk inherent to multilevel governance when Member States use the optional clauses meant to accommodate the interest of one specific Member State. Apart from this lobbying during the negotiations, the Dutch Refugee Council tried to provoke commitments from the government on the future transposition of the directive. According to the respondent, it was only during the last stage of the negotiations, that it really discovered the urgency of a lobby:

49 Strik, *Asiel- en migratierichtlijnen*, 75-82.

50 If this time-limit is exceeded, the regular conditions apply such as income requirement, see Article 12 paragraph 1, third sub-paragraph Directive 2003/86.

51 Strik, *Asiel- en migratierichtlijnen*, 75-82.

Initially, we didn't see the need for a lobby as the Commission proposals looked very good and we did not expect the Member States to bring the draft directive to such a low level. But we immediately addressed the deteriorations we saw in the revised Commission proposal in 2002.⁵²

A respondent from the Dutch Refugee Council explained that the NGO had based its impression on the official parliamentary documents of the government, in which the parliaments were informed rather selectively. This may have contributed to the NGOs having overlooked the 'race to the bottom' effect:

All Dutch NGOs have underestimated the domino-effect of national policy developments. We were therefore not so concerned about the 'worst practices' that appeared in the draft directives. Our impression was that the Member States negotiated very negatively and nationally, but that the Dutch negotiators were not to blame. We simply thought that they had little chance to achieve anything.⁵³

In Germany, the NGOs focused almost completely on the asylum part of the European harmonisation process. A large number of them cooperated in the platform 'Memorandum' for a common lobby on the German position in the EU negotiations. In parallel with the release of the first Commission proposal, they published recommendations for the European harmonisation of the asylum procedure, emphasising the need for compliance with the Refugee Convention and the European Convention on Human Rights, but also with the standards on protection as acknowledged by the *Bundesverfassungsgericht*.⁵⁴ They responded rather critically to the first Commission proposal, emphasizing that admissibility tests and accelerated procedures are not compatible with the Tampere conclusions of the European leaders that stated that asylum seekers had the right to access the asylum procedure in EU territory.⁵⁵ A respondent from Amnesty

52 'Brief van 25 november 2002 aan de woordvoerders asielbeleid van de Tweede Kamer', no. O.2.2.-269.sk. The Refugee Council informed the parliament that the Dutch government proposed to insert this time-limit into the directive. The government had failed to mention this in its letters to the parliament.

53 Strik, *Asiel- en migratierichtlijnen*, 402-405.

54 'Memorandum für den Schutz der Flüchtlinge', Amnesty International, Arbeiterwohlfahrt Bundesverband e.V., Deutscher Caritasverband e.V., Deutscher Paritätischer Wohlfahrtsverband, Deutsches Rotes Kreuz, Diakonisches Werk, Neue Richtervereinigung, Pro Asyl, Bundesweite Arbeitsgemeinschaft für Flüchtlinge, September 2000.

55 'Gemeinsame Stellungnahme zum Entwurf der Richtlinie der Kommission der Europäischen Gemeinschaften über Mindestnormen für Verfahren in den Mitgliedsstaaten zur Zuerkennung oder Aberkennung der Flüchtlingseigenschaft', Amnesty International, Arbeiterwohlfahrt Bundesverband e.V., Deutscher Caritasverband e.V., Deutscher Paritätischer

expressed her frustration that all interventions, their letters, statements during hearings in the Bundestag, and their occasional talks with the Minister for Interior did not have any influence on the position Germany took during the EU negotiations.

This result may also have been caused by the rather passive attitude of the *Bundestag*. The *Bundesrat* however, which is composed of representatives of the governments of the *Länder*, was much more active towards the German governmental position and was even represented in the German delegation during the negotiations. According to the Amnesty respondent, the NGOs did not approach members of the *Bundesrat* as these politicians always aimed to make the German position more restrictive. The active role of the German NGOs towards the Procedures Directive contrasted with their silence on the negotiations on the Family Reunification Directive. They concentrated on the national reforms of migration law, but the Commission proposal served as an inspiration for their national lobby. The EKD (*Evangelische Kirche in Deutschland*, an organisation for the evangelistic churches) expressed its optimism on the proposal for the Family Reunification Directive, as it would strengthen the right to family reunification in Germany for beneficiaries of international protection, for German spouses and for minor children aged 16 to 18.⁵⁶ After the Süssmuth Commission tasked with proposals for German reforms had proposed to introduce an age-limit of twelve years (children of twelve years and older had to speak the German language before admission), the EKD advised this commission to adopt the definition of a family as proposed by the European Commission.⁵⁷ The lobby was followed by other German NGOs, but the resistance against the age-limit for children did not get through to the negotiations in Brussels.⁵⁸ The respondent of the European Commission expressed his surprise that the German NGOs did not intervene on the German age-limit proposal, and assumed it was not in their interest to try to prevent this.

Like in the Netherlands, the involvement of the German NGOs only became apparent in Brussels after the Commission had released its revised proposal. One of the NGOs, the *Juristinnenbund*, concluded that its initial hope that the directive would correct the flaws in German legislation was replaced by the fear that the European standards would send the German rules on family reunification into a downward spiral. The organisation expressed its scepticism

Wohlfahrtsverband, Deutsches Rotes Kreuz, Diakonisches Werk, Neue Richtervereinigung, Pro Asyl, Bundesweite Arbeitsgemeinschaft für Flüchtlinge, 27 March 2001.

56 *Stellungnahme des Diakonischen Werkes der EKD zum Richtlinienentwurf der EU über das 'Recht auf Familienzusammenführung*, Diakonisches Werk der Evangelischen Kirche in Deutschland, Stuttgart, April 2000, www.ekd.de.

57 *Gemeinsame Stellungnahme zu den Vorschlägen der unabhängigen Kommission Zuwanderung des Bundesministers des Inneren*, Evangelische Kirche in Deutschland, Hannover/Bonn, 4 Juli 2001, www.ekd.de.

58 See for instance *Stellungnahme zum Aufenthaltsgesetz*, Neue Richtervereinigung, p. 7, 7 September 2001, www.nrv.de.

about the hope of the Commission that the standards could be raised at a later stage.⁵⁹

Many of the reasons for a limited impact I identified at the European level also apply to national NGOs. They shared with their European colleagues their concentration on the least influential actors. It must be noted that the coalition parties did not need to be receptive to their lobby, as their political choices emerged from heavy political support (the Netherlands) and delicate compromises (Germany). But the NGOs also seemed to limit their lobby at that level to the formal channels; just like their European colleagues, they had limited contact with the national officials negotiating in the Working Groups or Scifa. Their proactive and informal communication concentrated on the parliament, although parliamentary control was absent or at least ineffective. An analysis of their lobbying at the parliamentary level shows that even within the parliament they focused on the less active chambers (*Bundestag* and *Tweede Kamer*), and in them on the parties that already shared their views. Most of those parties belonged to the opposition, and the ones who were part of the coalition did not want to bind the government but preferred to leave room to the negotiators. Instead of trying to influence the decision makers directly, the NGOs relied heavily on their political allies in parliament, providing them with information and arguments.⁶⁰

Another important explanation of their weak position is that the NGOs, in contrast with for instance employers, trade unions or industries, did not represent an electoral lobby for their governments.⁶¹ Nevertheless, one could imagine that they had valuable information to offer to national civil servants, especially those involved in the EU negotiations, for instance regarding legislation and practices in other Member States. Using these sources from their umbrella organization in order to better inform themselves or to gain influence did not form a part of their strategy.

Apart from these factors explaining the limited success of NGOs, their unfamiliarity with EU legislation has also heavily influenced their actions and impact. As both directives were the first to be adopted at the EU level, they had gained no experience yet with (the meaning of) EU law. National NGOs were used to advocate or litigate at the national level or the level of the Council of Europe, of which the legal framework of reference significantly diverges from

59 *Stellungnahme zum geänderten Vorschlag der Europäischen Kommission für eine Richtlinie des Rates betreffend das Recht auf Familienzusammenführung vom 30. April 2002*, Deutscher Juristinnenbund, Berlin, 17 June 2002, www.djb.de.

60 Strik, *Asiel- en migratierichtlijnen*, 402-405.

61 A. van der Vleuten, *Dure vrouwen, dwarse staten, een institutioneel-realistische visie op de toestandkoming en implementatie van Europees beleid*, (Nijmegen 2001) 53; F. Duina & P. Kurzer, 'Smoke in your eyes: the struggle over tobacco control in the European Union', *Journal of European Public Policy* (2004), 66 and 69; M. Thatcher 'Winners and losers in europeanisation: reforming the national regulation of telecommunications', *West European Politics*, (2004, no 2) 305-306.

the EU level. As a consequence, they underestimated the imitative behaviour of Member States towards more restrictive approaches, but also the protective effect of certain provisions and definitions. The mere fact that the adoption of an EU directive sets migration law in the EU framework (including the Charter on Fundamental Rights), in which the EU Court of Justice has the last word on its interpretation and the Commission supervises compliance by the Member States, already means a huge loss of discretion for the Member States. On the other hand, NGOs had only little knowledge of EU law (including case-law) and the implications of certain EU concepts. They shared this limited knowledge with the negotiating national officials. It was the Commission that took advantage of being the only actor aware of the consequences of the use of certain definitions and references to other areas of EU law and of adopting recitals in the preamble. Their underestimation concerned both the (restrictive) political dynamics of EU harmonisation as well as the (protective) legal consequences of it.

Both the German and Dutch NGOs focused on national legislation and underestimated the potential impact of the optional clauses in the directives. Only regarding the Dutch requirements on family ties and the German *Drittstaatregelung* they showed European awareness by using the multilevel decision-making in a strategic way. Their underestimation of the directives did not only concern the weakening effects, but also their potentially binding effects and the protection they granted to migrants and refugees. National officials and politicians had not taken into account this binding effect either. They thought that they did not have to adapt their national policy and could maintain their discretion. To everyone's surprise however, the directives did not only fuel a race to the bottom, but also prevented governments from going even lower. Only when new ideas inspired by right-winged populists could not be realised because of the minimum standards of the directives, NGOs realised that harmonisation of EU migration law had also a limiting effect. In many regards the EU directives have raised the minimum standards compared to international law.

This awareness, which arose only after the adoption of the directives, made the NGOs finally embrace them and undertake actions to promote compliance. They presented complaints at the Commission, supported lawyers in their efforts to provoke a preliminary ruling from the Court of Justice and advocated at national parliaments to bring national policies into line with EU law. Van der Vleuten, who found that unwilling Member States only complied in case of pressure from both the supranational level and national actors, concluded that this function of NGOs is essential for compliance.⁶²

62 Van der Vleuten, *Dure vrouwen, dwarse staten*, 239.

9. Authority of NGOs

As mentioned before, Schrover, Vosters & Glynn identify three forms of authority NGOs can have: expert authority, logistical authority and moral authority, depending on the size, age and status of NGOs.⁶³ In this case-study, all three forms were potentially present.

Their expert authority was the most visible and useful, but as the NGOs apparently underestimated its value, they did not make full use of their expertise. In the field of migration, NGOs had possibly more expertise than they realised, on numbers, the situation in countries of origin, international standards but also the policies in the member states. They had access to information that is not always available to all negotiators but that NGOs have due to their umbrella construction. For example, Member States tend to hide the real objectives of their proposals in order to avoid objections. This was the case with the Netherlands, when it proposed to delete the provisions on fees, as this would be 'too detailed'. The other Member States agreed, but a respondent of the German government admitted that if he had known at that time that the Dutch level of fees was ten times higher than elsewhere, he would have objected.⁶⁴ After adoption of the Family Reunification Directive and the Long-Term Residents Directive, the Commission started an infringement procedure after which the Court of Justice forced the Netherlands to dramatically lower the level of fees. The Dutch government did not inform its parliament about its proposal to exclude a provision on fees, as it tended to describe its position in very general terms. NGOs could have shared the information on high fees in the Netherlands with its European colleagues, which would have enabled ECRE or CCME to make other delegations aware of this. Another use of the expert authority would have been if the EU-based NGOs had shared their information on the negotiations with the national ones, in order to raise awareness in parliament of the government position. The example of the German safe third country concept shows that such dissemination could lead to a mutually beneficial interaction between the levels.

Although some of the NGOs benefitted from their expertise on international human rights law, especially towards smaller national delegations, their overall lack of knowledge of EU legislation limited their possibility to influence the decision-making process. More expertise about the EU legal framework, but also more experience with the political dynamics related to EU decision-making, would have made them more alert to certain text proposals. A timely observation of these proposals would also require access to the negotiating process. On the other hand, however, more expertise on the EU legal framework would not have led to a better access to the negotiators, as national officials and NGOs had conflicting interests in this regard. On the contrary, they

63 Schrover *et al*, 'NGOs', 2019.

64 Strik, *Asiel- en migratierichtlijnen*, 120-133.

could take more advantage of not sharing this knowledge with the national officials, just like the Commission sometimes did.

So, expertise which NGOs could benefit from requires knowledge and information which the negotiating officials and the Commission or actors controlling the negotiators (like national parliaments or the European Parliament) may benefit from in a way that also contributes to the objectives of the NGOs. This mutually beneficial information may concern factual knowledge of specific national situations or national case-law (in order to 'warn' other member states or parliaments), or expertise on refugee law or human rights law, including international case-law. Regarding logistical authority, I distinguished two forms. Their umbrella organisation structure allowed the NGOs to gather relevant facts and expertise and transfer it to other levels: data on numbers, national policies, law or case-law. Another kind of logistical authority involved the capacity to organise publicity and mobilise people supporting their position with a view to strengthen their influence. As already mentioned, their efforts did not lead to the publicity nor to the public support that they envisaged. By confirming a lack of public support to mobilise on such issues, the Member States' tough positions were validated, meaning that this strategy actually had a counterproductive effect.

The NGOs used their moral authority while lobbying for EU legislation in line with human rights obligations, particularly those deriving from the Refugee Convention, the International Convention on the Rights of the Child and the European Convention on Human Rights. With more principles such as dignity, solidarity and the Christian duty to welcome strangers, churches took the moral high ground during their interventions. As previously observed, this authority was recognised and used by the Commission and Parliament, but hardly by the Member States and Council. The formal role of UNHCR strengthened its moral authority, which had some impact during the Council negotiations, especially when the Commissioner's approval depended on the position of UNHCR. That their moral authority lacked a clear impact on the public debate can be explained by the highly politicised debate on asylum and migration. Their public statements probably confirmed the opinion of people already in favour of a more migrant-friendly approach, but failed to convince others.

10. Discrepancies

There is a discrepancy between the objectives of the NGOs and their actions, which partly explains their limited impact. If we look at the formal decision-making process, it becomes clear that they did not focus sufficiently on the Council, and their actions towards the Council were not sufficiently tailor made (in time, content, and contacts) to produce an effective response. One of the formal obstacles they experienced was the lack of timely access to the, continuously changing, documents that were negotiated upon. These Council documents were

labelled as 'Limité', implying that their access was limited to directly involved officials. The European Parliament lacked formal access as well, and each national parliament depended on arrangements with its government. In the framework of a formal approval procedure, the Dutch parliament received the Council documents of legislative proposals discussed in the Council. The actual negotiations however took place at the level of officials, and were completed before they were placed on the agenda of Council meetings. As the adoption of the directives by the Council immediately bound the Member States, national parliaments had to exercise their power parallel to the negotiations. They struggled with the limited number of documents they had access to, but also with the prohibition to share these documents with third actors. Their inadequate information network did not only lead to deficiencies in the parliamentary control but also prevented civil society from becoming involved. The negotiations 'behind closed doors' hence inevitably affected the level of democratic legitimacy of the EU asylum and migration policy. It not only hindered NGOs from following the negotiations and responding effectively, but also failed to raise the interest and awareness of the public and to mobilise the necessary public support for their actions. So apart from the highly salient level of the debate on asylum and migration, the public ignorance of what was going on in Brussels kept the NGOs in a rather isolated position.

When the directives needed to be implemented at a national level and parliaments had to adopt legislation which transposed the directives, national NGOs actually became more involved and were more successful in creating publicity and reaching civil society. Also, at that national stage, they could have benefitted more from the umbrella structure, for instance by warning for worst practices from other Member States. In 2006, the Dutch government introduced the obligation to pass an integration examination abroad, before a family member was allowed to reunite with his or her spouse in the Netherlands. The Netherlands had managed to insert this condition in the Family Reunification Directive. Four years later, the German government adopted this Dutch condition without paying attention to the effects. German NGOs however could have learned from their Dutch colleagues that it had led to a significant drop in the number of visas issued and the number of applications for family reunification. The German debate focussed on the constitutionality of this condition, more specifically than on the question if it would form an obstacle for family reunification. Although the recent Dutch experience would have informed this discussion, it was not brought to the fore.

11. After Lisbon: has the role of NGOs changed?

My analysis of the role of NGOs concerns a period in which the decision-making process on asylum and migration legislation had a highly intergovernmental

character, which led to the Council having the most decisive role in dictating the final outcome. This context has obviously implied some limitations for the role NGOs could play, especially while the European Parliament was much more receptive of their positions but had less influence. It is therefore relevant to consider if the factors that determined their level of impact are still applicable since the Treaty of Lisbon changed the decision-making rules. Since then, the Council decides according to the ordinary legislative procedure as set out in Article 294 TFEU, on asylum and migration instruments. This implies effectively a two-chamber legislature, with the European Parliament and the Council as equal actors. Member States have to seek support for their proposals much more actively than before: with the other Member States (due to the qualified majority system) and with members of the European Parliament.

This procedure has opened up more venues of influence, since the amendments of the European Parliament can no longer be ignored. But this venue is not only used by NGOs anymore: since the EP gained more power, Members of Parliament are pressurised more by their own governments. Their new position seems to have made them less receptive to NGO lobbying, more particularly that related to human rights. Despite the formal equality between the Council and Parliament, the Council still exerts much more power, as it is able to confront the Parliament with a package deal, making it hard for the EP to change major things. At that stage and within the space left for the Parliament it will need technically suitable amendments, which may only lead to minor improvements. The increase of the EP's power may also have shifted the focus from a collective institutional interest to the different interests of the political parties. This change in attitude may imply a relationship between the power of the actor and the extent to which this actor is sensitive to advocacy or influence of NGOs. At the same time however, the composition of the Parliament has also changed, which is reflected by an increasing call for national sovereignty and restrictive migration policies. Like their likeminded Member States in the Council, political groups favouring that direction usually show limited interest in human rights advocacy by refugee organisations.

The qualified majority voting system means that it is no longer possible for one Member State to stick to its position without trying to find support. Member States have to be more pro-active and must try to form coalitions for their proposals. In theory this would leave more room for lobbying, but in practise officials have learned that they should come up with information and text proposals themselves. The extent to which NGOs can participate, for instance by offering revealing important information or improving text proposals, still depends on the match between 'supply and demand'. But their access to information remains crucial: in order to keep up with those dynamics, their access almost needs to be done in 'real time'. In its judgment *Access info Europe versus Council* of 2013, the Court of Justice recalled the consideration of the General Court that 'in the process of creating an ever closer union among the peoples of

Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen,⁶⁵ With this argumentation, the Court ruled that Member States should grant public access to their legislative documents. This ruling and subsequent case-law however has not yet stopped the Member States from keeping their cards against their chests.⁶⁶ However, the case-law combined with pressure from the parliaments and the EU Ombudsman has led the Council to negotiate on its procedures on the disclosure of documents. Beginning 2019 the EU Ombudsman O'Reilly applauded the European Parliament for adopting the Ombudsman's recommendations on transparency and accountability.⁶⁷

The vote will help convince national governments - in this most important EU election year - to agree to make EU law-making more open, so the public can see who is really taking the decisions.⁶⁸

12. Conclusion

This overview of the struggles and strategies of NGOs trying to influence decision-making on asylum and migration shows that these processes are not so accessible and transparent as they might look like from the outside. On the contrary, the fact that the lobbying takes place in public is rather an indication of the lack of access and transparency, which forces NGOs to access the media and influence the public debate. My research shows that NGOs changed their strategy over time, gradually shifting from an insider to an outsider perspective. This was not a freely chosen strategy, but was mainly related to the shift in institution they targeted. During the first stage of the process, the Commission played a prominent role as the initiator of the draft legislation. Because of the congruence between the preferences and aims of Commission and NGOs, the Commission was receptive to the lobbying of NGOs and UNHCR. They provided the Commission with information and arguments and helped to legitimise the Commission proposal. Also, with the European Parliament the organisations had a close relation, which led to the incorporation of their text into the parliamentary amendments. But from the moment the Council was in the steering position, its

65 CJEU 17 October 2013, C-280/11, *Access info Europe versus Council of the European Union*, recital 27.

66 See also General Court 22 March 2018, case T-540/15, *De Capitani v. European Parliament*, on access to documents of trilogies between the Parliament and the Council.

67 European Parliament resolution of 17 January 2019 on the Ombudsman's strategic inquiry OI/2/2017 on the transparency of legislative discussions in the preparatory bodies of the Council of the EU, P8_TA(2019)0045.

68 Magazine 'The European Parliament', 22 January 2019, <https://www.theparliamentmagazine.eu/articles/news/ombudsman-welcomes-parliament's-support-transparency-work>.

strategy to conceal the negotiations led to a loss of access and influence by the NGOs (and UNHCR to a large extent), which forced them to change their tactics. They took advantage of their outsider position by strongly condemning the lowered standards the Council was to adopt. So their lack of influence grew parallel to the alienation between their position and the position of the Council. This also caused alienation between the Commission and the NGOs, as its aim to reach an agreement among the Member States did not leave any room for outside influence. The influence civil society had at the initial stage of the process disappeared during the Council negotiations. The main reason for this was because the Council almost had exclusive power to adopt the directives.

The NGOs' outsider tactic was not successful either, as their strong press releases did not cause strong public outrage and opposition, or strong political opposition in the national parliaments, despite the display of their moral authority. Their criticism was not broadly shared, perhaps because the negotiations were an abstract phenomenon, but also because the restrictive tendency in the Council reflected the restrictive policy changes in the Member States. The governments' positions were carried by a majority in their parliaments. Shifting into an outsider tactic is irreversible, but the NGOs shifted to it at a moment they had already lost their influence from the inside.

This conclusion does not mean that the NGOs did not use their authority. They had moral, expert and logistical authority at different moments and venues. The Europeanisation of asylum and migration has created more possibilities to benefit from their expert and logistical authority, as their multilevel cooperation and exchanges offered them a unique source of information. As the processes under study included the first migration directives adopted at the EU level, their skills to make full use of it were also at an initial stage. Their experience and growing capacities, as well as the institutional changes that took place under the Lisbon Treaty, have expanded their possibilities to exercise influence. But Member States and Parliament have become more experienced as well, and Parliament's receptiveness has diminished due to its growing responsibility and its changes in political composition. Compared to the negotiations fifteen years ago, the political climate has enlarged the gap between the aims of NGOs and UNHCR and the political preferences of governments and parliamentary majorities. Just like then, NGOs use their moral authority to try to touch the hearts and consciousness of the public. The emergence of social media and other technological developments has enabled them to put a human face on immigration. But what is also new is their confrontation with public counterparts, proficient in responding to the fears of certain voters. The debate has become harder, more visible and polarised, but that does not say anything about the level of influence. In this harsh climate, where basic human rights of migrants can be threatened, we see NGOs trying to pursue different strategies such as Search and Rescue activities and monitoring at the borders, but also strategic litigation on the national level and the European Court on Human Rights. Their tendency to

file complaints at the European Commission is gradually increasing. These are other ways to influence the outcomes through expert and logistical authority, but with less dependence on political decision-making and more on independent courts. However, in order to influence migration policies, they should remain attentive to the political debate as well, as the room for interpretation by the European Courts also depends on the support of legislators and thus, the political decisions taken.

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